Supreme Court, U. S.
FILED
OCT 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-159

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, Affiliated Local Union 597,

Petitioner,

v.

LINBECK CONSTRUCTION CORP., A Texas corporation,

Respondent.

BRIEF OF LINBECK CONSTRUCTION CORP. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HUGH E. HACKNEY
JOE P. MARTIN
FULBRIGHT & JAWORSKI
800 Bank of the Southwest Building
Houston, Texas 77002
(713) 651-5151

OSCAR N. HIBLER, JR.
LINBECK CONSTRUCTION CORP.
3810 West Alabama
Houston, Texas 77027
(713) 621-2350

Attorneys for Respondent

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

Cases

Abbot v. Local Union 142 of the United Ass'ns of Journeymen and Apprentices of the Pipefitting Industry, 429 F.2d 786 (5th Cir. 1970)	9
Aircraft and Engine Maintenance and Overhaul, Building, Construction, Mfg., Processing and Distributing, Local 290 v. I. E. Schilling Co., Inc., 340 F.2d 286 (5th Cir. 1965)	9
Alyeska Pipeline Service Co., 421 U.S. 240 (1975)	4
Capeletti Bros., Inc. v. Local 487, 514 F.2d 1239 (5th Cir. 1975)	6, 9
Construction and General Laborers Local 438 v. Hardy Engineering and Construction Co., Inc. 354 F.2d (5th Cir. 1965)	9
Gulf Coast Building & Construction Trades Council v. F.R. Hoar & Son, Inc., 370 F.2d 746 (5th Cir. 1967)	9
International Ass'n of Bridge, Structural and Ornamental Ironworkers, Affiliated Local Union 597 v. Linbeck Construction Corp., 547 F.2d 948 (1977)	4
Local 20, Teamsters Union v. Morton, 377 U.S. 252 (1964)	7, 8
Local 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. Humko Co., Inc., 287 F.2d 231 (6th Cir. 1961), *cert. denied*. 366 U.S. 962 (1962)	5, 6, 9

	PAGE
Mason-Rust Laborers' Int'l Union of North America, AFL-CIO, 435 F.2d 939 (8th Cir. 1970)	5, 8, 9
Mead v. Retail Clerks Int. Ass'n, Local Union No. 839, AFL-CIO, 520 F.2d 1371 (9th Cir. 1975)	6
Refrigeration Contractors, Inc. v. Local 211, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, 501 F.2d 668 (5th Cir. 1974)	5, 9
Sillman v. Teamsters, Local Union No. 386, 535 F.2d 1172 (9th Cir. 1976)	6
Sheet Metal Wks. Int. Ass'n, Local 223 v. Atlas Sheet Metal Co., 384 F.2d 101 (5th Cir. 1967)	9
Scott v. Local Union 377, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, 584 F.2d 1244 (6th Cir. 1977)	7
Vulcan Materials Co. v. United Steelworkers, 430 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971)	5, 8, 9, 12

Statutes

Labor-Management Relations Act, § 8(b)(4)(i)(B), 29 U.S.C. § 158 (b)(4)(i)(B) (1970)	2
Labor-Management Relations Act, § 301, 29 U.S.C. § 185 (1970)	2
Labor-Management Relations Act, § 303, 29 U.S.C. § 187 (1970)	5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-159

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, Affiliated Local Union 597,

Petitioner,

v.

LINBECK CONSTRUCTION CORP., A Texas corporation,

Respondent.

BRIEF OF LINEBECK CONSTRUCTION CORP. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Whether litigation expenses incurred in effectuating a resumption of work in forums other than a federal court prior to filing suit under § 303 of the Labor-Management Relations Act can be recovered as damages sustained by a prevailing party in a § 303 action.

STATEMENT OF THE CASE

This case arose when Respondent, Linbeck Construction Corporation (hereinafter referred to as "Respondent"), filed an action for damages pursuant to §301 of the National Labor Relations Act, as amended, 29 U.S.C. §187 (1970) (hereinafter referred to as the "Act"), against the Petitioner, International Association of Bridge, Structural and Ornamental Iron Workers, Affiliated Local Union 597 (hereinafter referred to as "Petitioner"), in the United States District Court for the Middle District of Florida, Jacksonville Division, on July 22, 1974.

The pertinent facts of this case are that on or about May 11, 1973 the Petitioner caused its members or those employees that it represents, employed by Linbeck on the Baptist Memorial Hospital project in Jacksonville, Florida, to join in a concerted refusal to perform work for the purpose of inducing or coercing Respondent to cease doing business with Architectural Products, Inc. On May 17, 1973, Respondent filed an unfair labor practice charge with the National Labor Relations Board (hereinafter referred to as "NLRB"), pursuant to the provisions of the Act, 29 U.S.C. 58(b)(4)(i)(B) (1970). After an investigation of the charge, an Administrative Complaint was issued by the NLRB and a hearing was held before a duly designated Administrative Law Judge on July 17, 1973.

Following the hearing at which time all parties were represented by counsel, presented evidence, cross-examined witnesses, and presented oral arguments, the Administrative Law Judge issued his recommended decision on September 20, 1973, finding the Petitioner in violation of §8(b)(4)(i)(B) of the Act. Further, on January 21, 1974, the NLRB issued its decision, finding that the Petitioner had unlawfully violated §8(b)(4)(i)(B) of the Act.

As a result and proximate cause of the unlawful conduct of the Petitioner complained of in the instant case, the Respondent was forced to hire counsel for the purpose of instituting legal action to remove picket signs from its jobsite in Jacksonville, Florida, and otherwise effectuating a resumption of work in the aftermath of the unlawful work stoppage resulting from Petitioner's conduct.

Respondent, in an attempt to expedite the hearing of this matter before the trial court, filed a motion for partial summary judgment requesting that it be awarded reasonable litigation expenses incumbent in litigation necessary to effectuate a resumption of work which had been stopped by the illegal secondary activity of the Petitioner.

Based upon the pleadings, affidavits and interrogatories on file at the time of the hearing on the Motion for Partial Summary Judgment, the district court found that Respondent was entitled to a partial summary judgment. In a further effort to expedite the handling of this matter, the parties involved requested permission to file an interlocutory appeal on the controlling issue of law. A motion for interlocutory appeal was granted by the district court and accepted by the Court of Appeals for the Fifth Circuit. A panel of the Fifth Circuit unanimously affirmed the trial court decision in favor of Respondent, and Petitioner's Petition for Rehearing and Petition for Rehearing en Banc were denied.

ARGUMENT

I. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IN *International Association of Bridge, Structural and Ornamental Iron Workers, Affiliated Local Union 597* v. *Linbeck Construction Corporation, 547 F2d 948 (1977)*, IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT IN *Alyeska Pipeline Service Co.* v. *Wilderness Society, 421 U.S. 240 (1975)*, AND *Local 20 Teamsters Union* v. *Morton, 377 U.S. 252 (1964)*.

The instant case does not involve the award of attorneys' fees to a prevailing party in federal litigation absent a statutory or contractual authorization for such attorneys' fees. As Petitioner concedes in its brief to this Court, the instant case also does not involve the concept of the "private attorney general".[1] Nor does this case involve any exercise of the equitable power of the federal courts to fashion an exception to the "American rule" that litigation expenses will not be awarded to a prevailing party in federal litigation absent an exception to that rule traditionally recognized by this Court. In short, the instant case does not involve any of the policy considerations underlying this Court's decision in *Alyeska Pipeline, supra*.

In *Alyeska Pipeline*, this Court specifically condemned the "private attorney general" exception to the American Rule of awarding of attorneys' fees and generally reaffirmed the policy embodied in the "American Rule". 421 U.S. 269-70.

However, this Court, in *Alyeska Pipeline*, did not hold that litigation expenses could not be an element of *damages*

[1] Brief for Petitioner at 8.

when such damages were incurred in a forum other than a federal court and as a consequence of the unlawful activity of the person later made a party defendant to a federal suit filed pursuant to § 303 of the National Labor Relations Act, 29 U.S.C. §187(a)-(b) (1970).

§ 303 provides in relevant part that:

> (a) It shall be unlawful . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 158 (b)(4) . . ..
>
> (b) [W]hoever shall be injured in his business or property by reason [of] any violation of subsection (a) . . . may sue therefore in any district court of the United States . . . and shall recover the damages by him sustained and the costs of the suit.

The Fifth Circuit, as well as apparently all circuits that have considered the issue, has consistently recognized that the cost of litigation necessary to cause a cessation of unlawful activity by a Union can properly be considered an element of *damages* in a subsequent § 303 suit against the Union. *See e.g., Linbeck Construction Corp., supra; Refrigeration Contractors, Inc.* v. *Local Union 211, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 501 F.2d 668, 671 (5th Cir. 1971); *Mason-Rust Laborers' Int'l Union of North America, AFL-CIO, Local 42*, 435 F.2d 939, 948 (8th Cir. 1970); *Vulcan Materials Co.* v. *United Steelworkers*, 430 F.2d 446, 457 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971); *Local Union 984, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO* v. *Humko Co.*, 287 F.2d 231, 243 (6th Cir. 1961), *cert. denied*, 366 U.S. 962 (1962).

The Fifth Circuit, as well as other circuits, clearly recognizes the distinction between damages awarded for administrative proceedings before the NLRB, necessary to end an unlawful work stoppage and to obtain a resumption of work, and attorneys' fees claimed by a party bringing a § 303 suit. As the Petitioner concedes, the Fifth Circuit has denied attorneys' fees to a prevailing party for bringing a § 303 action.[2] *See, e.g., Capeletti Bros., Inc.* v. *Local No. 487, Int'l Union of Operating Engineers, AFL-CIO*, 514 F.2d 1239, 1240-41 (5th Cir. 1975). *See also Local Union 984, Int'l Union of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO* v. *Humko Co., Inc.*, 287 F.2d 231, 243-44 (6th Cir. 1961), *cert. denied* 366 U.S. 962 (1962).

Petitioner's contention that the decisions of the Fifth, Sixth, and Eighth Circuits are in conflict with a decision of the Ninth Circuit is erroneous. The Ninth Circuit decision in *Mead* v. *Retail Clerks International Ass'n, Local Union No. 839, AFL-CIO*, 523 F.2d 1371 (1975) must be read in conjunction with a subsequent decision of the Ninth Circuit in *Sillman* v. *Teamsters Local Union No. 386, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 535 F.2d 1172 (9th Cir. 1976). In *Sillman*, decided seven months after *Mead*, the Ninth Circuit, without even citing *Mead*, apparently upheld an award of litigation expenses for prior NLRB litigation. The *Sillman* decision condemns only the award of litigation expenses for bringing a subsequent § 303 action, and does not discuss the issue of litigation expenses as damages for the prior NLRB proceedings. In addition, the *Sillman* court cites for authority decisions of the Fifth and Sixth Circuits upholding the award of litigation expenses for prior proceedings in other forums. 535 F.2d at 1175.

[2] Brief for Petitioner at 9.

Thus, the Ninth Circuit has either overruled *Mead, sub silencio*, or clarified *Mead* to bring it into conformity with the decisions of other circuits that litigation expenses for prior litigation may be damages, but litigation expenses cannot be awarded for bringing the § 303 proceeding.

The critical distinction the Petitioner has missed is that between litigation expenses awarded for a § 303 action, and litigation expenses as damages for prior proceedings, independent of the § 303 action, necessitated by the unlawful conduct of the Petitioner. As the Sixth Circuit has recently held in a case challenging litigation expenses as damages for proceedings prior to the filing of a suit under § 301 of the National Labor Relations Act, 29 U.S.C. § 185 (1970):

> The Supreme Court in *Alyeska* reaffirmed the traditional American Rule that attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization. We do not read the decision as in any way affecting those cases in which the attorneys' fees are not an award to the successful litigant in the case at hand, but rather are the subject of the lawsuit itself. More particularly, we do not understand that the decision in *Alyeska* in any way affects the measure of damages which can be awarded to a prevailing plaintiff in a suit for breach of a union's duty of fair representation in an action under § 301.

Scott v. *Local Union 377, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 548 F.2d 1244, 1246 (6th Cir. 1977).

There is also no merit in Petitioner's further contention that the decision of the Fifth Circuit in the instant case is in conflict with the decision of this Court in *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton*, 377 U.S. 252 (1964). In *Morton*, this Court held that damages under § 303

are limited to compensatory damages and thus do not include any award for punitive damages. *Id.* at 260-61. Clearly, compensatory damages within the meaning of § 303 can include litigation expenses incurred in forums other than a federal court, prior to the filing of a § 303 suit, when such litigation expenses were incurred as a direct result of the unlawful activity of the § 303 defendant. All courts that have considered this issue have reached this result. *See, e.g., Linbeck Construction Corp.* v. *International Association of Bridge, Structural & Ornamental Iron Workers, Affiliated Local Union No. 597*, 547 F.2d 948, 950 (5th Cir. 1977); *Vulcan Materials Co.* v. *United Steelworkers of America, AFL-CIO*, 430 F.2d 446, 457 (5th Cir. 1970), *cert. denied* 401 U.S. 963 (1971); *Mason-Rust* v. *Laborers International Union, Local 442*, 435 F.2d (8th Cir. 1970); *H.L. Robertson & Associates* v. *Plumbers Local Union No. 519, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO*, 429 F.2d 520, 522 (5th Cir. 1970).

Thus, the decision of the Fifth Circuit in this case is not in conflict with the decisions of this Court in *Alyeska Pipeline* and *Morton*.

II. THE FIFTH CIRCUIT CORRECTLY INTERPRETED THE MEASURE OF DAMAGES IN A SECTION 303 PROCEEDING TO BE THOSE DAMAGES INCURRED IN PRIOR PROCEEDINGS THAT WERE NECESSARY TO EFFECTUATE A RESUMPTION OF WORK.

The measure of damages in the form of litigation expenses for prior proceedings in other forums, applied by the Fifth Circuit in the instant case, was whether the damages as litigation expenses were incurred in effectuating a resumption of work. This position is a settled rule of all courts

that have considered the issue. *See Linbeck Construction Corp.* v. *International Association of Bridge, Structual and Ornamental Iron Workers, Affiliated With Local Union No. 597*, 547 F.2d 948, 950 (5th Cir. 1977); *Capeletti Bros., Inc.* v. *Local 487*, 514 F.2d 1239, 1241 (5th Cir. 1975); *Refrigeration Contractors, Inc.* v. *Local Union 211, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 501 F.2d 668, 671 (5th Cir. 1974); *Mason-Rust Laborers; Int'l Union of North America, AFL-CIO*, 435 F.2d 939, 948 (8th Cir. 1970); *Vulcan Materials Co.* v. *United Steelworkers*, 430 F.2d 446, 457 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971); *Abbott* v. *Local Union 142 of the United Ass'ns of Journeymen and Apprentices of the Pipefitting Industry*, 429 F.2d 786, 790 (5th Cir. 1970); *H. L. Robertson & Associates, Inc.* v. *Plumbers Local 519, United Ass'n. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 429 F.2d 520, 522 (5th Cir. 1970); *Sheet Metal Wkrs. Int. Ass'n, Local 233* v. *Atlas Sheet Metal Co.*, 384 F.2d 101, 110 (5th Cir. 1967); *Gulf Coast Building & Construction Trades Council* v. *F.R. Hoar & Son, Inc.*, 370 F.2d 746, 748 (5th Cir. 1967); *Construction and General Laborers Local 438* v. *Hardy Engineering and Construction Co., Inc.*, 354 F.2d 24, 27 (5th Cir. 1965); *Aircraft and Engine Maintenance and Overhaul, Building, Construction, Mfg., Processing and Distribution, Local 290* v. *I.E. Schilling Co., Inc.*, 340 F.2d 286, 289 (5th Cir. 1965); *Local Union 984, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO* v. *Humko Co. Inc.*, 287 F.2d 231, 243 (6th Cir. 1961), *cert. denied*, 366 U.S. 962 (1962).

Petitioner argues that the litigation expenses as damages awarded by the trial court for Respondent's prior expenses before the NLRB were not properly incurred in effectuating a resumption of work. Petitioner's contention was resolved against it by the trial court which examined affidavits filed by the Respondent regarding its litigation expenses and held

a full evidentiary hearing at which the trial court concluded that the prior litigation expenses incurred by the Respondent were properly incurred in effectuating a resumption of work. The Fifth Circuit affirmed and cited with approval the fact finding of the trial court that:

> It cannot be said that the pendency of the [NLRB] action had no bearing on defendant's decision to resume work. Nor can it be said that continued prosecution had no influence on their decision to stay on the job.

Linbeck Construction Corp. v. *International Ass'n. of Bridge, Structural, and Ornamental Iron Workers, Local Union No. 597*, 547 F.2d 948, 950 (5th Cir. 1977).

The fact finding of the trial court that Respondent incurred its litigation expenses in effectuating a resumption of work is supported by substantial evidence.

III. THE DECISION IN THE INSTANT CASE CORRECTLY APPLIED THE RULES OF RES JUDICATA OR COLLATERAL ESTOPPEL TO THE FACTS OF THE CASE AND THERE WAS NO FAILURE ON THE PART OF THE RESPONDENT TO MITIGATE ITS DAMAGES.

Petitioner correctly notes that the finding of unlawful activity by the NLRB was res judicata or collateral estoppel on the issue of the Petitioner's liability to Respondent in the subsequent §303 proceeding. Petitioner further argues, however, that the finding of a one-day violation by the NLRB is conclusive proof that litigation expenses incurred by the Respondent after the date of the one-day violation found by the NLRB were not incurred in effectuating a resumption of work. Petitioner's argument demonstrates a basic misunderstanding of the concept of effectuating a resumption of work.

The fact that the NLRB found a one-day violation does not mean that litigation expenses incurred by the Respondent for its participation in the NLRB proceedings that ultimately led to a finding of a one-day violation were not incurred in effectuating a resumption of work. The fact that the unlawful activity of Petitioner may have physically ceased before the NLRB determined that Petitioner had engaged in a one-day violation of the Act does not mean that the proceedings before the NLRB did not effectuate a resumption of work by forcing the Petitioner to physically cease its unlawful activity and prevent continuing unlawful activity by Petitioner arising out of the same transaction or occurrence that led Petitioner to initially commence its unlawful activity. As evidenced in Section *B* of this brief, *supra*, the trial court found as a matter of fact that the NLRB proceedings were instrumental in preventing a reoccurrence of unlawful activity by the Petitioner and the Fifth Circuit specifically affirmed this finding.

Petitioner's final contention that Respondent failed to mitigate its damages is totally without merit. First, Petitioner appears to misunderstand the interrelationship between a proceeding before the NLRB alleging an unlawful labor practice pursuant to §8(b)(4)(i)(ii)(B) and a proceeding in a federal court pursuant to §303. In enacting §303, Congress provided a statutory remedy for damages under §303 which could be maintained in federal courts regardless of the outcome of proceedings between the same parties before the NLRB. Therefore, §303 is cumulative of the rights and remedies available to a charging party before the NLRB. Thus, there is no requirement of election of forums, either of federal court or the NLRB, for a person who has been injured as a result of activity made unlawful by both §303 and §8(b)(4). Before the NLRB, a charging party is seeking an end to unlawful activity and a resumption of work. In a §303 suit, a plaintiff is seeking recovery

for the "damages sustained" as a result of the unlawful work stoppage.

It is worth noting that there is not a single citation in Petitioner's brief for the novel argument that resorting to the administrative machinery of the NLRB, the agency with special expertise in labor-management relations, is a failure to mitigate damages for the purposes of a subsequent § 303 suit. The only citation in Petitioner's brief for the general duty of a § 303 plaintiff to mitigate damages is *Vulcan Materials Co.* v. *United Steelworkers*, 430 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971), in which the Fifth Circuit specifically allowed litigation expenses incurred in prior NLRB proceedings as damages sustained for purposes of a § 303 action.

CONCLUSION

For the reasons set forth above, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

FULBRIGHT & JAWORSKI

BY: .....

HUGH E. HACKNEY
JOE P. MARTIN
800 Bank of the Southwest Building
Houston, Texas 77002
Telephone: (713) 651-5151

OSCAR N. HIBLER, JR.
LINBECK CONSTRUCTION CORP.
3810 West Alabama
Houston, Texas 77027
Telephone: (713) 621-2350

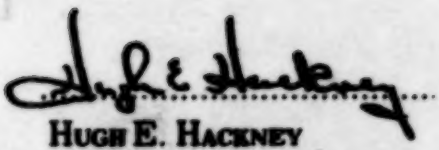
ATTORNEYS FOR RESPONDENT LINBECK CONSTRUCTION CORP.

CERTIFICATE OF SERVICE

I, the undersigned counsel of record for Respondent, Linbeck Construction Corp., hereby certify that on this the 19th day of October, 1977, I have mailed, postage prepaid, copies of the foregoing brief to counsel listed below:

Joseph F. Farley
MAHON, FARLEY & VICKERS
350 East Adams Street
Jacksonville, Florida 32202

Attorneys for Petitioner



HUGH E. HACKNEY
FULBRIGHT & JAWORSKI
800 Bank of the Southwest Building
Houston, Texas 77002